In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 519

RICHARD MILLER, FENTON LEON BASH AND SAMUEL B. WOODS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the Northern District of Indiana of violating 18 U.S.C. 1952 by using an interstate facility in promotion of the "unlawful activity" of gambling, prohibited by the laws of Indiana. Each was sentenced to imprisonment for five years, six months of which was to be served in jail and the balance on probation, and each was fined $5,000.

The undisputed evidence showed that petitioners owned and operated poolrooms in Gary, Indiana, in which a gambling enterprise known as "pool-selling" was conducted. The winning ticket was decided by reference to scores of professional baseball games. Each poolroom had a Western Union ticker tape, which petitioners used to obtain the baseball scores rapidly. The results of the ballgames were transmitted from Chicago, Illinois, to the Western Union office in Gary, and relayed to the poolhalls.

Petitioners admitted operating the gambling enterprises with knowledge that their activity was in violation of Indiana law. However, each of them testified that he did not know that the use of the ticker tape was or could be a violation of any federal law. The sole issue raised is whether the trial judge erred in instructing the jury that the government was not required to prove that the defendants specifically knew of, and intended to violate, the federal statute (Pet. App. H). The district court held that this was not an element of the offense (Pet. App. A, 258 F. Supp. 807), and the court of appeals affirmed (Pet. App. B).

The rulings of the courts below were correct. The wording of the pertinent portion of 18 U.S.C. 1952 is plain:

> (a) Whoever * * * uses any facility in interstate * * * commerce * * * with intent to—
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> (3) * * * facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs * * * (3), shall be fined * * * or imprisoned * * * or both.

(b) As used in this section "unlawful activity" means * * * any business enterprise involving gambling * * * in violation of the laws of the State in which * * * committed or of the United States.

The statute on its face makes it a crime for any person to use a facility in interstate commerce with intent to promote a gambling enterprise if that enterprise violates State law. Neither the language nor the legislative history of this act supports petitioners' contention that Congress intended to limit prosecutions to persons who were shown to be aware of its provisions.

The purpose of 18 U.S.C. 1952 was to curtail racketeering and other crimes by making unlawful any interstate travel in furtherance of such activity. See *United States* v. *Zizzo*, 338 F. 2d 577, 580 (C.A. 7), certiorari denied, 381 U.S. 915. The statute originally prohibited only travel with intent to aid unlawful activities. The Senate added as a separate section a proscription against the use of "any facility for transportation in interstate or foreign commerce, including the mail." The Senate Judiciary Committee explained its amendment (S. Rep. No. 644, 87th Cong., 1st Sess., p. 2):

> The purpose of the third amendment, proposed by Senator Kenneth B. Keating of New York, which adds a new section 2 to the bill, is to bring within the provisions of the bill the use

> of any facility for transportation in interstate or foreign commerce, including the mail, with intent to do any of those acts which are enumerated in the first section of the bill.

The House Committee on the Judiciary subsequently combined the travel and use-of-facility sections into a single section as it now appears in the law (H. Rep. No. 966, 87th Cong., 1st Sess., p. 2). Despite the detailed attention given to this statute, and the enactment of companion legislation prohibiting "knowing" use of interstate commerce in pursuit of certain other enumerated activities,[1] Congress at no time attached such an element of proof to this section.

In 18 U.S.C. 1952, Congress has expressly set forth what specific intent is necessary to constitute a violation of the act: an intent to promote an "unlawful activity," which is defined to include a business enterprise involving gambling in violation of the laws of the State in which it is conducted *or* of the United States. Petitioners admitted that they knew that their gambling activities violated Indiana law. Having admittedly utilized the interstate telegraph with the specific intent to aid their unlawful activity in Indiana, petitioners acted with the only type of guilty knowledge required by the statute.[2]

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[1] See 18 U.S.C. 1084 and 1953.

[2] Petitioner's reliance upon *Morissette* v. *United States*, 342 U.S. 246, is not well founded. This Court determined in *Morrissette* that when Congress enacted a statute founded on concepts of stealing well defined in common law to include

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

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an intent to deprive a rightful owner of his property, its failure to specifically mention this element of intent, an essential ingredient in the common-law offense, did not eliminate the need to prove that element.

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